Supreme Court, U.S.
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No. 97-1424

In The

# Supreme Court of the United States

October Term, 1997

LAWRENCE E. TOLERSON,

*Petitioner,*

vs.

AUBURN STEEL COMPANY, INC., SUMITOMO CORPORATION OF AMERICA, SC STEEL INVESTMENT, INC. and YAMATO KOGYO (U.S.A.) CORPORATION d/b/a ARKANSAS STEEL ASSOCIATES, an association of partners,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit**

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

Was Petitioner's discharge racially motivated when he was discharged for repeatedly sleeping while on the job?

## PARTIES TO THE PROCEEDING

The only parties to this proceeding are Petitioner, Lawrence E. Tolerson (Tolerson), and Respondents, Auburn Steel Company, Inc., Sumitomo Corporation of America, SC Steel Investment, Inc., and Yamato Kogyo (U.S.A.) Corporation d/b/a Arkansas Steel Associates, an association of partners (ASA).

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## STATEMENT OF THE CASE

Petitioner (Tolerson), a black male, was initially employed by Respondent, Arkansas Steel Associates (ASA), as a maintenance electrician on November 14, 1989. After being involved in several electrical accidents between December 1, 1989, and March 28, 1990, ASA moved Tolerson to a lateral position of maintenance mechanic, with no reduction in salary or benefits, and with no change in his working conditions or hours.

Tolerson worked the midnight shift (11:00 p.m. to 7:00 a.m.) so that he would be free during daylight hours to run his outside business as an owner and operator of a funeral home. ASA discharged Tolerson on May 8, 1995, for sleeping on duty after he had received a written warning for an earlier incident of the same nature. At that time, Tolerson admitted to sleeping on duty on several occasions when he had not been caught.

Tolerson sued ASA in the United States District Court, Eastern District of Arkansas, claiming racial discrimination. The District Court granted summary judgment for ASA. Tolerson appealed the decision to the United States Court of Appeals, Eighth Circuit, which affirmed the District Court's decision. Tolerson now brings this Petition.

## ARGUMENT

### THE DISTRICT COURT AND THE COURT OF APPEALS PROPERLY APPLIED THE LAW AS IT PERTAINS TO SUMMARY JUDGMENT.

In Tolerson's Petition for a Writ of Certiorari, he asserts that the District Court erred in granting ASA's motion for summary judgment and that, therefore, the Court of Appeals erred in affirming that decision. Tolerson claims that the lower courts made erroneous factual findings and misapplied a properly stated rule of law, specifically *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), as it relates to summary judgments. Both of Tolerson's points for granting the Petition are identical and will be discussed as such below.

"Certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Supreme Court Rule (10). Tolerson's argument is that the lower courts failed to properly evaluate the facts according to the framework set out in *McDonnell Douglas*.

Under *McDonnell*, if the plaintiff presents a prima facie case of racial discrimination, the defendant may rebut the prima facie case by demonstrating legitimate, non-discriminatory reasons for the adverse employment actions. If the defendant does so, summary judgment will be appropriate unless the plaintiff offers convincing evidence that the defendant's articulated reasons for the adverse actions were a pretext for racial discrimination. *McLaughlin v. Esselte Pendaflex Corp.*, 50 F.3d 507, 510 (8th Cir. 1995) (applying *McDonnell Douglas*). The District Court concluded that Tolerson had proved a prima facie

case of discrimination, but that he had failed to show any evidence of pretext for race discrimination. (Abst. at 9a).

The factual basis for the District Court's granting of summary judgment was that Tolerson was discharged by ASA because he had repeatedly slipped away from his work area and found a place to sleep when he was supposed to have been working. The first incident occurred on April 28, 1994, when he left his work area and hid in a laundry loft to sleep. He was only given a written warning on that occasion. Then, on May 5, 1995, Tolerson was found sleeping under a blanket in the back of his van when he was supposed to have been working. He later admitted to ASA that he had slept on several other similar occasions when he had not been caught. At that point, ASA terminated Tolerson's employment.

Tolerson claims that his firing was racially motivated because other employees had slept on the job and were not discharged. However, the only evidence of that claim presented by Tolerson was that other employees, including himself, had been caught momentarily snoozing in their work areas and had not been seriously disciplined for having done so.

Although Tolerson was the only person to be terminated by ASA for sleeping, he was the only person to have been caught sneaking away from his work station to sleep, which he did on at least two occasions. Tolerson has presented no evidence to the contrary. On the first occasion, ASA only gave Tolerson a written warning, which is substantially the same action ASA took regarding the only other incident involving another employee whose conduct was similar to Tolerson's – only the other

employee (a white person) did not sneak away from his work station but slept soundly for an inordinately long period of time while on duty. Unlike Tolerson, the white employee heeded his warning and was never again caught sleeping on duty. However, Tolerson disregarded his warning and committed the same offense a second time, and even admitted to having committed the same offense on other occasions when he wasn't caught. Tolerson has admitted that, prior to each incident, he had not presented to ASA a doctor's statement indicating that he was not able to work. In its Summary Judgment Order, the District Court stated "[p]laintiff was not treated differently than other employees who stood in similar shoes. Plaintiff, having been reprimanded for sleeping four times and having left his work area twice to sleep, cannot benefit from comparing himself to employees who committed less egregious actions." (Abst. at 29a).

## CONCLUSION

It is clear from the facts of the case that the District Court properly applied the well-founded standard for summary judgment set forth in *McDonnell Douglas*. The District Court's opinion is well-reasoned and sound on all points. As the United States Court of Appeals for the Eighth Circuit stated "[w]e have nothing of substance to add to the thorough and soundly reasoned opinion of the

District Court." (Abst. 2a). Therefore, Tolerson's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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